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No. 411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM F. BASLOW AND KARL SORENSON, *Petitioners*

v.

STUART ROTHMAN, *et al.*, Individually and as General Counsel, Chairman and Members Respectively of, and Constituting the NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

STUART ROTHMAN, *et al.*, Individually and as General Counsel, Chairman and Members Respectively of, and Constituting the NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on June 29, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra*, pp. 1a-2a) is reported at 278 F. 2d 866. On petition for rehearing *en banc* filed by Petitioners (Appendix, *infra*, pp. 3a-6a) the Court of Appeals amended its prior opinion on June 17, 1960 (Appendix, *infra*, p. 2a) and by Order entered June 29, 1960 (Appendix p. 7a) denied the petition for rehearing.

JURISDICTION

The first opinion of the Court of Appeals was entered on March 31, 1960 (Appendix *infra*, pp. 1a-2a) and amended by its Order entered on June 17, 1960 (Appendix, *infra*, p. 2a) and the Petitioners' petition for rehearing *en banc*, timely filed on April 15, 1960 (Appendix *infra*, pp. 3a-6a) was denied by Order of the Court filed on June 29, 1960. (Appendix *infra*, p. 7a)

This Petition is timely filed and the jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether employees, who are members of a labor organization which does not have an agreement requiring membership therein as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended, have the right to refrain from taking part in a strike or other activities of such labor organization, as guaranteed to them by Section 7 of said Act.

2. Whether the proviso to Section 8 (b) (1) (A) of that Act permits a labor organization to prescribe rules, other than those with respect to the acquisition or retention of membership therein, which may have a restraining or coercive effect upon employees' exercise of Section 7 rights.

3. Whether the District Court has jurisdiction to review the arbitrary or illegal refusal of the General Counsel of the National Labor Relations Board to issue a complaint of unfair labor practices.

STATUTES INVOLVED

The statutes which this case involves are the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151 *et seq.*); the Administrative Procedure Act (60 Stat. 237 as amended, 5 U.S.C. Section 1001 *et seq.*); the Federal Declaratory Judgment Act (28 U.S.C. Section 2201) and 28 U.S.C. Section 1337.

The pertinent provisions of the respective statutes are as follows:

National Labor Relations Act:

> Sec. 3(d). "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

> Sec. 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Sec. 8. (b) "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . ."

The Administrative Procedure Act:

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION—The form of proceeding for judicial review shall be any statutory review proceeding relevant to the subject matter in any court specified by statute or in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibiting or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . .

* * * * * * * * *

(e) SCOPE OF REVIEW—So far as necessary to decision and where presented the reviewing court

shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The Federal Declaratory Judgment Act, Sec. 2201.

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28, U.S.C., section 1337.

"The district courts shall have original jurisdiction of any civil action or proceeding arising under

any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

STATEMENT

A. The Facts

Petitioners Bandlow and Sorenson were employees of the Allen Bradley Company, and members of Local 78, Tool and Die Makers Lodge of the International Association of Machinists, AFL-CIO. (R. 3).

A collective bargaining agreement existed between the Company and the Union, covering an approximate 90 tool room employees, including petitioners (R. 4) until September 1, 1956, and when the parties failed in arriving at a new agreement, the Union initiated a strike at the plant and established picket lines in and around its entrances.

The collective bargaining agreement which had been in existence immediately prior thereto, did not contain any union security provision requiring membership of the employees in the Union as a condition of employment. (R. 4).

Petitioner Bandlow at no time took part in any of the picket activities during the strike, and continued his active employment at the plant uninterruptedly. (R. 5).

Petitioner Sorenson, on the other hand, at first did take some part in the strike activities of the Union, but then abandoned those activities over the protest of members of the Union, and returned to his job at the plant while the strike continued its progress. (R. 7).

On the first working day that the strike was in progress, Bandlow was questioned by a member of

the local Union's bargaining committee who was on the picket line, as to why he was reporting for work. The following day, this same picket, two other members of the bargaining committee and an International representative of the Union went to Bandlow's home, where it was suggested to Bandlow (1) that he stop work, (2) that he quit his job and go to work for another company. Upon his refusal to do either, the International representative threatened that the Union would bring a charge against him and fine him $500.00 for refusing to go on strike, and would furthermore "blackball" him against getting a job anywhere else. (R. 4, 5, 19). Bandlow, nevertheless, refused to go out on strike.

Later in September of 1956, Bandlow filed a charge of unfair labor practices with the regional director of the National Labor Relations Board, charging the Union with violating Section 8 (b) (1) (A) of the National Labor Relations Act by threatening him with a fine and other coercive action because he had elected not to take part in the strike (R. 5), and the charges were further substantiated by his counsel, by letter of September 28, 1956 (R. 18) sent to the regional director.

Thereafter, on October 31, 1956, Bandlow was advised by the Union that he had been fined $100.00 (R. 17) and Sorenson was similarly advised, as were twelve other employees who are not part of the instant case. Both refused to pay the $100.00 fine assessed, and the Union filed an action against both in the Civil Court for Milwaukee County, Wisconsin, to collect it. (R. 6, 7).

By correspondence extending from September 28, 1956, to October 4, 1957 (R. 18-29) petitioners' counsel

was advised by the General Counsel of the National Labor Relations Board of his refusal to issue a complaint of unfair labor practices against the Union.

B. The General Counsel's Position

The position of the General Counsel in refusing to issue a complaint of unfair labor practices against the Union in this case "involving the imposition by the Union of a fine on its members who crossed its picket line and returned to work during the strike:" was set forth in his letter to petitioners' counsel (R. 28-29) as follows:

> "Although Section 7 of the Act gives an employee an opportunity to join or refrain from joining in union activity, the proviso to 8 (b) (1) (A) allows the Union to prescribe its own rules with respect to acquisition or retention of membership therein. In this connection the Board relying in part on the legislative history of the Act, has held that 'The imposition of a fine on a union member is considered an internal affair within the meaning of the proviso.' (See *Minneapolis Star and Tribune Co.*, 109 NLRB 727 at 729). In view of this and, particularly, since there was no substantial evidence that the action taken by the Union caused or was intended to cause the Company to discriminate against the charging parties and no showing that their tenure of employment had been affected in any manner, the General Counsel concluded that a violation of the Act had not been established."

C. The Decision of the District Court

Petitioners alleged jurisdiction in the United States District Court for the District of Columbia over the Complaint for Declaratory Judgment and Mandatory Injunction (R. 2), under the Labor Management Rela-

tions Act of 1947, as amended, 29 U.S.C., Sections 151 *et seq.*; the Administrative Procedure Act, 5 U.S.C., Section 1001 *et seq.*; Sections 10(a), 10(b), 10(c) and 10(e); the Federal Declaratory Judgment Act, 28 U.S.C., Section 2201, 28 U.S.C., Section 1337; and the Constitution of the United States, Article I, Section 8 thereof and Amendment V thereto.

By memorandum opinion (R. 93) the Court granted the defendants' motion to dismiss the complaint "on the grounds that the Court is without jurisdiction over the subject matter, and the complaint fails to state a a claim upon which relief can be granted.

> *Hourihan* v. *National Labor Relations Board, et al.*, 91 U.S. App. D.C. 316, 201 F. 2d 187 (1952).
> *National Labor Relations Board* v. *Lewis*, 249 F. 2d 832 (9th Cir. 1957)."

D. The Decision of the Court of Appeals

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction of the case under 28 U.S.C. 1291, 1294.

By its Order of March 31, 1960, amended June 17, 1960 (Appendix *infra* p. 2a), the Court affirmed the dismissal of the complaint by the District Court, holding "It 'has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order which is not before the Board.'" Citing *Hourihan* v. *National Labor Relations Board*, 91 U.S. App. D.C. 316, 317, 201 F. 2d 187, 188, cert. denied 345 U.S. 930.

The Court did not answer the first two questions presented to it for decision, identical to questions (1) and (2) presented to this Court *supra* p. 2.

REASONS FOR GRANTING THE WRIT

Petitioners urge that this Court should grant certiorari in this case because the Court of Appeals has decided an important question of Federal law in a manner which completely negates one of the basic concepts of the National Labor Relations Act, and which question has not been, but should be, settled by this Court; and has ignored two important questions presented to it for decision, neither of which has been ruled upon by this Court; but should be.

It is appropriate that this Court resolve these questions, because the holding of the Court of Appeals adversely affects the basic rights, under the Act, of every one of an approximate 17,000,000 unionized employees in the United States. (See National and International Labor Unions in the United States, Bulletin No. 1267, 1959, Bureau of Labor Statistics, U. S. Department of Labor).

Addressing ourselves to the questions in the order in which they are presented to this Court, Section 7 of the Act very clearly provides that employees shall have the right to join and take part in union activities, and shall also have the right to *refrain* from any or all of such activities. Their right to refrain from taking part in such activities was afforded by Taft-Hartley amendment in 1947, and, according to the late Senator Taft, one of the sponsors of the bill, the new language merely made mandatory an interpretation "which the Board itself had already arrived at administratively . . . Moreover, the Board itself has held that a right to refrain from the exercise of the rights guaranteed in Section 7 was always implicit in the Wagner Act. (See *Pittsburgh Plate Glass Co.*, 66 NLRB 1083)." 93 Cong. Rec. 6859.

No clearer reason can be given for the inclusion of the language giving employees the right to refrain from taking part in concerted activities than that stated by Senator Taft in the same reference, when he said: "The reason for its inclusion was that similar language had appeared in the House bill and since section 8(b)(1) of the Senate bill, which was retained by the conferees, made it an unfair labor practice for labor organizations to restrain or coerce employees in the rights guaranteed them in section 7, the House conferees insisted that there be express language in section 7, which would make the prohibition contained in section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line."

Mr. Justice Brennan speaking for the majority of this Court, as recently as March of 1960, in *NLRB* v. *Local Union No. 639*, 362 U.S. 275 stated:

> "However, the Taft-Hartley Act added another right of employees also guaranteed protection, namely, the right to refrain from joining a union, except as that right might be affected by an agreement authorized in § 8(a)(3). Thus tension exists between the two rights of employees protected by § 7—their right to form, join or assist labor organizations, and their right to refrain from doing so." See also Mr. Chief Justice Warren's statement in *Automobile Workers* v. *Russell*, 356 U.S. 634, 655: "Since the right to refrain from concerted activities is protected by § 7 of the Act, a § 8(b)(1)(A) unfair labor practice is inherent in the wrong of which plaintiff complains, and the Federal Act offers machinery to correct it.'"

Inasmuch as employees have the "protected" right to refrain from concerted activities, petitioners here

had such a right, subject only to any exceptions thereto which the Act might provide. The General Counsel argues that another such exception is implicit in the proviso to Section 8 (b) (1) (A) of the Act which states that the right of a labor organization to prescribe its own *rules with respect to the acquisition or retention of membership* therein shall not be impaired. This argument must be rejected. The proviso to Section 8 (b) (1) (A) relates to acquisition or retention of membership alone, and nothing else. It relates, in the words of Senator Holland, who introduced the proviso to Section 8 (b) (1) (A) in Congress, to "the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership." 93 Cong. Rec. 4272.

The position of petitioners' here was the identical position adhered to by the Board for a number of years, and by the courts[1] until the Board's decision in *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954), in which the Board held that a union fine against an employee for failure to attend union meetings during a strike and failure to engage in picketing was an activity outside the scope of the unfair labor practice prohibition contained in Section 8 (b) (1) (A) of the Act, and was governed by the proviso to the above section. The Board posited its decision in that case upon the purported legislative history governing such a con-

[1] *Great Atlantic and Pacific Tea Co.*, 110 NLRB 918, 922; *Eagle Manufacturing Corp.*, 112 NLRB 74; *International Typographical Union*, 86 NLRB 951, 955-7; *Matter of National Maritime Union*, 78 NLRB 971, enforced 175 F. 2d 686 (C.A. 2); *Sunset Line & Twine Co.*, 79 NLRB 1487; *NLRB v. Bell Aircraft Corp.* (1953, C.A. 2), 206 F. 2d 235; *Injection Molding Co.*, 104 NLRB 639, 645 (1953).

struction and although petitioners in this case pointed out conclusively that the Board's reference to the legislative history was erroneous, since it pertained to an entirely different section of the Act (R. 79), nevertheless the General Counsel proceeded to arrive at the same result.

This interpretation of Section 8 (b) (1) (A) has never been reviewed by the courts, and therefore should be reviewed by this Court, especially in view of the fact that subsequent decisions by the Board itself confirmed the position for which petitioners here contend. See *United Steel Workers of America*, 123 NLRB No. 35; *Local No. 1400 United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 115 NLRB 126. See also Twenty-second Annual Report of the National Labor Relations Board for the fiscal year ended June 30, 1957, page 85. Petitioners position "that the Board's interpretation of Section 8(b)(1)(A) finds support neither in the way Congress structured Section 8(b) nor in the legislative history of Section 8(b)(1)(A).", has best been explained by this Court itself in *NLRB* v. *Local Union No. 639*, 362 U.S. 275.

The opinion of the Court of Appeals, by leaving unanswered petitioners' questions concerning their "protected" right to refrain from taking part in concerted activities, free from union coercion not based upon rules with respect to acquisition or retention of membership therein, stands for the proposition that the General Counsel enjoys complete freedom from judicial restraint. Further, the employees have been given no right whatever by the Act except to the extent that the General Counsel, in his sole discretion, determines to proceed on any employee's behalf. This Court

never having ruled on the important question concerning the status of the General Counsel, the Court of Appeals cited with approval for its holding, its own decision in the case of *Hourihan* v. *NLRB*, 91 U.S. App. D.C. 316, 317, 201 F. 2d 187, 188, cert. denied 345 U.S. 930.

That case involved the evaluation of evidence before the Court, and under the circumstances there present the Court had refused to order the General Counsel to act, holding at the same time, in footnote 4, "We need not here canvass whether, and if so, under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue a complaint." Petitioners contend that in the instant case, the facts before the General Counsel (R. 18-29) being clear and uncontroverted, and constituting prima facie evidence of a violation of Section 8 (b) (1) (A) of the Act by the Union, no room was left for the General Counsel to make any evaluation of the evidence, and his failure to proceed to issue a complaint charging unfair labor practices constituted an illegal and arbitrary refusal to take action made mandatory by the plain wording of the statute, and is subject to correction by the judiciary.

Albeit the statute gives the General Counsel "final authority on behalf of the Board in respect of the investigation of charges and issuance of complaints," petitioners contend that the reference to the "final authority" of the General Counsel cloaks him with an administrative, and not a judicial, finality. To hold otherwise is to say that the entire purposes of the Act may be thwarted by the General Counsel for whatever reason, or for no reason at all, and irrespective of however arbitrary or illegal.

Petitioners hardly believe that such a result was intended by the Congress. As this Court stated in *Leedom* v. *Kyne*, 358 U.S. 184, "This Court cannot lightly infer that Congress does not intend judicial protection of the rights it confers against agency action taken in excess of delegated powers;" Cf. *Harmon* v. *Brucker*, 355 U.S. 579, 2 L. ed. 2d 503, 78 S. Ct. 433; *Stark* v. *Wickard*, 321 U.S. 288, 64 S. Ct. 559; *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 95, 47 L. ed. 90, 23 S. Ct. 33. Where a statute clearly shows that Congress has given rights to employees, as it obviously intended by its correlative amendments to Section 7 and the enactment of Section 8 (b) (1) (A) in the Taft-Hartley Act, this Court should hold that the Congress intended those rights to be enforced and encounter no difficulty in fulfilling the congressional purposes. *Texas & N.O.R. Co.* v. *Brotherhood of R. & S. S. Clerks*, 281 U.S. 548, 74 L. ed. 1034, 50 S. Ct. 427.

There can be no question that the Administrative Procedure Act is applicable to the National Labor Relations Act as amended. See *Air Line Dispatchers*, 189 F. 2d 685; *Red Spot Electric Co.*, 191 F. 2d 697; *NLRB* v. *Guy S. Atkinson Co.*, 195 F. 2d 141; *Marine Engineers* v. *NLRB*, 202 F. 2d 546. See also *Brownell* v. *We Shung*, 352 U.S. 180.

Petitioners contend that under the statute the General Counsel's decisions are subject to judicial review, whether pursuant to the Administrative Procedure Act or to the original equity jurisdiction of the courts. This was pointed out by Senator Taft during the debates preceding the passage of the Act when, with reference to Section 3 (d) of the Act he stated "it is asserted that this is inconsistent with the Adminis-

trative Procedure Act and that it places a tremendous amount of unreviewable power in the hands of a single official * * * So far as having unfettered discretion is concerned, he, of course, must respect the rules of decision of the Board and of the courts." 93 Cong Rec. 7001. Similarly, he stated on the floor of the Senate just prior to the passage of the Act over the Presidential veto: "Under this bill, the counsel will have the right to make the decision as between employer and employee: but his decision will be subject to the judicial decision of the Board and, above the Board, the Courts; and we have given the Courts greater power to look into the decisions of the Board and to provide for the redress of any injustice." 93 Cong. Rec. 7538.

It is submitted that to afford judicial review under the circumstances present in this case is consonant with this Court's holding in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 88 L. ed. 61, 64 S. Ct. 95, to the effect that if the absence of jurisdiction of the federal courts would result in the sacrifice or obliteration of a right the Congress had created, the inference would be strong that the Congress had intended that the statutory provisions governing the equity jurisdiction of those courts should control. To do otherwise is to say that the Congress intended to confer upon the employees in question certain rights, but to leave the enjoyment of those rights unenforceable at the whim of the General Counsel.

Inasmuch as the three questions presented to this Court involve important questions of federal law which have not been decided by this Court, but should be because of their importance in carrying out the statutory purposes and the orderly administration of the Act, it is earnestly suggested that certiorari be granted.

CONCLUSION

For the reasons stated this petition for certiorari should be granted.

Respectfully submitted,

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September, 1960

APPENDIX

APPENDIX

Filed March 31, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15279

WILLIAM F. BANDLOW and KARL SORENSON, *Appellants*

v.

STUART ROTHMAN, *et al.*, individually and as General Counsel, Chairman and Members, respectively, of and constituting the National Labor Relations Board, *Appellees*

Appeal from the United States District Court for the District of Columbia

---

Decided March 31, 1960

Mr. Karl M. Dollak for appellants.

Mr. Duane B. Beeson, Attorney, National Labor Relations Board, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for appellees. *Mr. Richard J. Scupi*, Attorney, National Labor Relations Board, also entered an appearance for appellees.

Before EDGERTON, BAZELON, and BURGER, *Circuit Judges*.

PER CURIAM: Appellants asked the District Court to require the General Counsel of the National Labor Relations Board to issue a complaint charging unfair labor

practices. They also sought to compel the Board to set aside the General Counsel's refusal. This appeal is from an order dismissing the complaint on the grounds that the District Court had no jurisdiction of the subject matter and that the complaint failed to state a claim on which relief could be granted. The court was clearly right. It "has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board." *Hourihan* v. *National Labor Relations Board*, 91 U.S.App.D.C. 316, 317, 201 F. 2d 187, 188, *cert. denied* 345 U.S. 930.

Affirmed.

Filed March 31, 1960

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

PER CURIAM.

Dated: March 31, 1960.

Filed June 17, 1960

Order

It is ORDERED by the court that the last sentence of the opinion filed herein March 31, 1960, reading as follows:

> This is still true if, as appellants allege, the General Counsel has misconstrued the statute.

is hereby stricken.

PER CURIAM.

Dated: June 17, 1960

Petition for Rehearing En Banc

Come now the appellants Bandlow and Sorenson, and petition this Court to permit a rehearing before the Court *en banc* of its judgment, entered on March 31, 1960, affirming in a per curiam opinion the order of the United States District Court for the District of Columbia dismissing the complaint on the grounds that that Court had no jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted.

In support thereof the following is respectfully submitted:

1. The Court has the statutory power to order rehearings *en banc*, 28 U.S.C. 46(c); Rule 26(a), of the Rules of this Court.

2. In view of the importance of a definitive decision by this Court on the questions presented to it in the Brief for Appellants, to the proper administration of the National Labor Relations Act as amended, it is respectfully suggested that inasmuch as the Court in its judgment answers only the third of three questions, and that the judgment is not dispositive of the first two questions presented, consideration by the full Court is warranted.

In its judgment of March 31, 1960, this Court posited its decision solely upon the case of *Hourihan* v. *National Labor Relations Board*, 91 U.S. App. D.C. 316, 317, 201 F. 2d 187, 188, *cert. denied* 345 U.S. 930, which case had been decided on the basis of a permitted exercise of discretion by the General Counsel of the National Labor Relations Board.

In the instant case appellants contend and, we respectfully submit, showed, that on the basis of the facts involved, the General Counsel ignored the plain language of the statute, as well as the facts which were admitted by the appellees, and refused to issue a complaint of unfair

labor practices, in complete derogation of the statutory mandate upon him to do so under those circumstances.

Appellants contend that in the case at hand, the facts being admitted, and the plain wording of the statute guaranteeing to the employees "the protected right . . . to work in the face of a strike. . . ." (J.A. 52-53), no room existed for the exercise of discretion by the General Counsel and it was mandatory for him to issue the complaint requested.

This Court in its judgment of March 31, 1960, made no reference whatever to its footnote in the *Hourihan* case in which it had stated:

> "We need not here canvass whether, and if so, under what circumstances, a court can correct an abuse of discretion by the General Counsel in failing to issue a complaint."

Thus it would appear, without this Court having so stated, that its judgment in the instant case stands for the proposition that a Court has no power whatever, under any circumstances, to order the General Counsel to proceed. The Court stated, in the last sentence of its judgment that "This is still true if, as appellants allege, the General Counsel has misconstrued the statute."

In view of the fact that the National Labor Relations Board, in its 23rd Annual Report, for the fiscal year ended June 30, 1958, stated, at page 82, that ". . . Section 8(b)(1)(A) is clear and requires no construction, . . .", it is difficult to fathom how the General Counsel, who theoretically is to be guided by the opinions of the Board, can take refuge in an alleged misconstruction of the statute.

Appellants respectfully contend that a combination of (1) the undisputed facts in the instant case, (2) the legislative history of the Act, (3) the policy of the statute, and (4) the later decisions of the Board itself all require issuance by the General Counsel of a complaint of unfair labor

practice charges, and that his refusal to do so under all of the circumstances constitutes not an exercise of discretion, where discretion there can be none, but rather illegal inaction on his part where positive action is required.

As has been repetitiously pointed out, section 7 of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), "guarantees" to employees the right to refrain from taking part in union activities, except to the extent that they may be required to join a labor organization as a condition of employment as authorized in section 8(a)(3).

Additionally, section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in section 7, with the proviso that a labor organization may prescribe its own rules with respect to the *acquisition* or *retention* of membership therein. It seems obvious to appellants that the term "acquisition or retention of membership" applies only to the beginning or terminating of membership and certainly does not apply to union rules pertaining to anything else.

The Court's failure to answer questions 1 and 2, presented for decision in the Brief for Appellants, holds in abeyance a vitally needed clarification which appellants sincerely feel is required for the proper administration of an Act which affects millions of employees who are members of labor organizations and subject to the interpretation of the Act.

The effect of this Court's judgment as it now stands, is that no employees who are members of a labor organization, have any right whatever to refrain from taking part in a strike or other union activities, if the labor organization of which they happen to be members, prescribes rules which require them to take part in such activities.

Appellants respectfully suggest that neither the plain wording of the Act, nor its policy, call for such a result.

By the same token, appellants respectfully contend that the plain wording of the Act, as well as its legislative history, do not permit a labor organization to prescribe rules which have a restraining or coercive effect upon employees' exercise of rights guaranteed them under section 7 of the Act, other than rules relating solely to the acquisition or retention or the "beginning or terminating" of membership.

In view of the dearth of judicial pronouncement dispositive of questions 1 and 2 included in appellants' STATEMENT OF QUESTIONS PRESENTED in their Brief before this Court, it is respectfully submitted that appellants are entitled to a clear declaration by this Court, of their rights under the statute.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that the Court's discretion would most appropriately be exercised by the order of a rehearing *en banc*.

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CERTIFICATE OF GOOD FAITH

It is hereby certified that this Petition for Rehearing is presented in good faith and not for delay.

/s/ KARL M. DOLLAK
Karl M. Dollak

Filed June 29, 1960

Order

On consideration of appellants' petition for rehearing en banc, it is

ORDERED by the court that the petition is denied,

PER CURIAM.